

1 Nathan J. Arnold, WSBA No. 45356
2 Cloutier Arnold Jacobowitz, PLLC
3 2701 First Ave., Ste. 200
4 Seattle, WA 98121
5 113 East Woodin Ave., Ste. 200
6 Chelan, WA 98816
7 (206) 799-4221
8 Nathan@CAJLawyers.com
9

10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF WASHINGTON**

11 KENNETH R. EVANS, an
12 individual,

13 Plaintiff,

14 v.

15 SHELLPOINT MORTGAGE
16 SERVICES aka NEWREZ, LLC, a
17 Delaware corporation; MTC
18 FINANCIAL, dba TRUSTEE
19 CORPS, a California Corporation;
20 and THE BANK OF NEW YORK
21 MELLON FKA THE BANK OF
NEW YORK AS TRUSTEE FOR
THE CERTIFICATEHOLDERS
CWABS, INC., ASSET-BACKED
CERTIFICATES, SERIES 2006-21.

Defendants.

Case No. 2:19-cv-00288-TOR

**MOTION FOR PRELIMINARY
INJUNCTION OF TRUSTEE'S
SALE**

12/6/2019

With Oral Argument: 9:00 a.m.

22 **I. INTRODUCTION**

23 Despite the Statute of Limitations having run, Plaintiff, Kenneth R. Evans
24 (“Evans”), is threatened, for the fourth time, with the imminent loss of his home. Mr.
25

1 Evans brings this action to enjoin this latest trustee's sale, scheduled for December 13,
2 2019, to prevent irreparable harm, while the Court determines the party's respective
3 rights.
4

5 **II. STATEMENT OF FACTS**

6 Kenneth Evans lives at 155 Washington Street in Manson, Washington, which
7 he owns in fee simple, since December 2006. Verified Complaint ¶ 9. Evans was first
8 threatened with the loss of his home during the Countrywide mortgage crisis of 2008,
9 by Notice of Default which Evans' was led to believe he cured. *Id.* ¶ 13. On June 3,
10 2010 a Notice of Trustee Sale (the "2010 Notice") was recorded against Evans' home.
11 Verified Complaint Exhibit A, recorded with Chelan County at AFN Instrument No.
12 2324292. *Id.* ¶ 14. The 2010 Notice set a foreclosure sale date of September 3, 2010
13 and stated the loan could not be reinstated after August 23, 2010. *Id.* ¶ 15 & 17. The
14 September 2010 foreclosure sale did not occur. *Id.* ¶ 18.
15
16
17

18 Six months after the first foreclosure sale was to take place, on February 2, 2011,
19 a new Notice of Trustee Sale (the "2011 Notice") was recorded against Evans' home.
20 Verified Complaint Exhibit B, recorded with Chelan County at Instrument No.
21 2337809. *Id.* ¶ 19. With like language, the 2011 Notice stated that reinstatement could
22 not be had after April 20, 2011 and set a foreclosure sale date of May 6, 2011. *Id.* ¶ 20
23 & 22. *Id.* Plaintiff Evans brought a case in Chelan County (removed to federal court)
24
25

1 after the reinstatement cutoff date to restrain the sale, and the May 6, 2011 sale did not
2 occur. ¶ 24–26. Instead, on September 20, 2011 a Notice of Discontinuance of Trustee
3 Sale was recorded with the County. Verified Complaint Exhibit C, recorded with
4 Chelan County at Instrument No. 2349367. *Id.* ¶ 27.

6 More than six years went by, and on April 23, 2019, another Notice of Trustee
7 Sale was recorded, naming the current beneficiary as “The Bank of New York Mellon
8 FKA The Bank of New York as Trustee for the Certificateholders CWABS, Inc., Asset-
9 Backed Certificates, Series 2006-21,” the current trustee as “MRC Financial Inc., dba
10 Trustee Corps,” and the current servicer as “NewRez LLC KA New Penn Financial,
11 LLC DBA Shellpoint Mortgage Servicing,” (the “2019 Notice”). Verified Complaint
12 Exhibit D, recorded with Chelan County at Instrument No. 2494919. *Id.* ¶ 29.

15 Mr. Evans filed this case and moved to restrain the sale in Chelan County
16 Superior Court. (Dkt. No. 1-1). The motion was not heard, because Defendants
17 voluntarily rescheduled the sale and removed the case to this Court. (Dkt. No. 1);
18 Declaration of Nathan J. Arnold ¶ 2, filed herewith. The new sale date noticed by
19 Defendants is December 14, 2019. Declaration of Nathan J. Arnold ¶ 3 & Exh. A. The
20 monthly premium allegedly due on the note is \$3,805.02. *Id.* ¶ 3 & Exh. B.

21 **III. STATEMENT OF THE ISSUES**

22 Should a non-judicial foreclosure take place where the applicable Statute of
23

1 Limitation has run? *No*.

2 **IV. EVIDENCE RELIED UPON**

3 This motion relies upon the Verified Complaint filed in this matter and exhibits
4 thereto, and the Declaration of Nathan J. Arnold filed herewith.

5 **V. ARGUMENT**

6 *A. Standards for Injunction*

7
8 Washington law provides for an injunction where a party has (1) a clear legal and
9 equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3)
10 that the acts complained of are either resulting in or will result in actual and substantial
11 injury to him. RCW 7.40.020; *Kucera v. Dep't of Transportation*, 140 Wash.2d 200,
12 209-210, 995 P.2d 63 (2000). It is well-established in Washington law that the
13 appropriate way, and often the only way, to raise objections to a serious flaw in non-
14 judicial foreclosure proceedings, is by a lawsuit and motion to restrain the sale, filed
15 before the sale. *Brown v. Household Realty Corp.*, 146 Wash. App. 157, 164, 189 P.3d
16 233 (2008) (objections waived because no attempt to restrain sale); *see* RCW 61.24.127
17 (certain claims for damages not waived). A homeowner threatened with an improper
18 trustee's sale, such as Mr. Evans, meets all three requirements for an injunction: he has
19 clear legal rights in his home; his rights of possession and quiet enjoyment are
20 imminently endangered by the impending sale; and the wrongful sale would result in
21
22
23
24
25

1 actual and substantial injury in that he would lose his home.

2 Federal procedure, similarly, allows the Court to issue an injunction when a
3 plaintiff shows “that he is likely to succeed on the merits, that he is likely to suffer
4 irreparable harm in the absence of preliminary relief, that the balance of equities tips
5 in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def.*
6 *Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). These
7 factors may be considered on a “sliding scale,” so that “serious questions going to the
8 merits and a balance of hardships that tips sharply towards the plaintiff can support
9 issuance of a preliminary injunction, so long as the plaintiff also shows that there is a
10 likelihood of irreparable injury and that the injunction is in the public interest.”
11 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal
12 quotation marks omitted).

13 Generally speaking, the “irreparable harm” and “balance of hardship” factors
14 are met when a residential homeowner seeks to enjoin foreclosure of his home. For
15 example, this Court’s sister court noted that:

16
17 failure to issue an injunction will result in the sale of plaintiff’s
18 home, a loss that would be irreparable and would not be adequately
19 compensated through an award of money damages. The balance of
20 hardships tips decidedly in favor of issuing an injunction:
21 defendants’ financial interests can be adequately protected by
22 requiring payments on the loan while this matter is pending, whereas
23 plaintiff’s interests would be substantially destroyed if the
24
25

1 foreclosure sale were to proceed.

2 *McDonald v. OneWest Bank, FSB*, C10-1952RSL, 2011 WL 252733, at *3 (W.D.
3 Wash. Jan. 25, 2011). Because a lawsuit for an injunction is the only practical way to
4 prevent abuses by institutional servicers and debt collectors of the otherwise-non-
5 judicial foreclosure process, the public interest tends to be best served by an injunction
6 in such cases. *Id.* (“the public interest supports a measured and substantive evaluation
7 of the legal impact of defendants' business practices.”)
8

9
10 Thus, the only real variable in such cases is the homeowner’s likelihood of
11 success on the merits, or as the *Cottrell* panel put it, whether he raises a serious question
12 going to the merits of the case. Here, Mr. Evans raises at least the following serious
13 questions on the merits.
14

15 *B. The Statute of Limitations Has Run*
16

17 The statute of limitations to enforce a promissory note is six years. RCW
18 4.16.040(1). Although the statute of limitation can run separately on each installment
19 of an installment note, the statute runs on the entire note upon acceleration. *4518 S.*
20 *256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wash. App. 423, 434-35, 382 P.3d 1 (2016)
21 Here, the 2011 Notice’s express disallowance of reinstatement and demand for the
22 entire alleged balance of principal, interest, and charges on the note constituted an
23 acceleration of the debt, as of no later than April 26, 2011 (if not August 23, 2010, based
24
25

1 on the 2010 Notice), the date upon which, according to the notice, the note could not be
2 reinstated and Defendants' alleged predecessors in interest claimed an immediate right
3 to the entire balance. Verified Complaint ¶¶ 16, 21; *and see Wash. Fed., N.A. v. Azure*
4 *Chelan LLC*, 195 Wash. App. 644, 664, 382 P.3d 20, 30 (2016) (debt accelerated by
5 Notice of Default, despite possibility of reinstatement); *but see U.S. Bank N.A. as Tr. of*
6 *Holders of Adjustable Rate Mortgage Tr. 2007-2 v. Ukpoma*, 8 Wash. App. 2d 254, 438
7 P.3d 141, 144–45 (2019) (opposite result on same language).¹ Even assuming,
8 *arguendo*, that the Statute of Limitations may have been tolled during the pendency of
9 the 2011 non-judicial foreclosure proceedings, it began to run again no later than
10 September 20, 2011, when the Discontinuance of Sale was recorded, ending the
11 non-judicial foreclosure process. From that Discontinuance of Sale date until the April
12 23, 2019 Notice, was more than six years. Verified Complaint Exhs. C, E.

13
14 At minimum, all installments and charges allegedly more than six years overdue
15 are barred by the statute of limitations, rendering the 2019 Notice greatly inflated and
16 defective.

17
18 *C. Independent of Statute of Limitations, Defendants Impermissibly Sat on Any*
19 *Rights.*
20

21
22
23
24
25

¹ The latter case is confusing, not least because it fails to even address the contrary precedent in the same court, even though the panel split on this issue. But neither of these cases addressed acceleration by the expiration of the reinstatement period set by a Notice of Trustee's Sale.

1 Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the
2 other party from such delay. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139
3 Wash.2d 840, 991 P.2d 1161, 1166 (Wash. 2000).
4

5 Mr. Evans has been threatened with the loss of his home since as early as 2008.
6 Verified Complaint ¶ 13. Mr. Evans believed he has reached an accord and cured that
7 earlier default in 2008. *Id.* But Defendants' alleged predecessors in interest renewed
8 their efforts to foreclose two years later, false started, resumed another year later, false
9 started again, and then sat on their rights until a total of eleven (11) years after 2008.
10 Mr. Evans could have done any number of things, including refinancing or disposing
11 of the property and finding a new home, during that time period.
12

13
14 *D. The Notice is Defective under the Foreclosure Fairness Act*
15

16 Defendant Shellpoint refused the request by Mr. Evans' counsel to conduct a
17 meeting to compromise under the Foreclosure Fairness Act, required by
18 RCW 61.24.031. Verified Complaint ¶¶ 36–38. The sale should be enjoined, at
19 minimum, until such time as Defendants satisfy that statute.
20

21 At minimum, the Statute of Limitations has unquestionably run on any
22 installment due six years prior to the 2019 Notice. The 2019 Notice is therefore
23 defective for overstating the reinstatement amount, required to be stated accurately by
24 RCW 61.24.040(1)(f). The sale should be enjoined until, at minimum, such time that
25

1 Defendants provide notice of the actual amount required for Mr. Evans to reinstate his
2 loan and preserve his home.

3 *E. Under Statute, Bond should be Set at Monthly Mortgage Premium*
4

5 Defendants noticed the non-judicial foreclosure sale under the Washington
6 Deed of Trust Act, RCW ch. 61.24. Under that statute, when a foreclosure sale is
7 preliminarily enjoined:
8

9 The court shall require as a condition of granting the
10 restraining order or injunction that the applicant pay to the
11 clerk of the court the sums that would be due on the obligation
12 secured by the deed of trust if the deed of trust was not being
13 foreclosed:

14 (a) In the case of default in making the periodic payment of
15 principal, interest, and reserves, such sums shall be the
16 periodic payment of principal, interest, and reserves paid to
17 the clerk of the court every thirty days.

18 (b) In the case of default in making payment of an obligation
19 then fully payable by its terms, such sums shall be the amount
20 of interest accruing monthly on said obligation at the
21 nondefault rate, paid to the clerk of the court every thirty days.

22 RCW § 61.24.130(1). Although Mr. Evans denies that either of these should apply, the
23 note having long ago been accelerated and gone stale, Defendants' notice of sale is
24 premised on the belief that he is in default of periodic payments. The purpose of an
25 injunction bond is to potentially compensate the restrained party for its loss should the
injunction turn out upon final adjudication to have been unjustly imposed. *Mellon v.*
Reg'l Tr. Servs. Corp., 182 Wash. App. 476, 498, 334 P.3d 1120, 1130 (2014).

1 Therefore, the appropriate bond is the monthly premium supposedly due on the note,
2 \$3,805.92 per month to be paid into the registry of the Court during the pendency of
3 this action.
4

5 **VI. CONCLUSION**

6 Because the limitations period has run, and for the other reasons set forth above,
7 the Court should enjoin the sale of Mr. Evans' home at least until the parties' rights can
8 be fully adjudicated, to avoid irreparable harm.
9

10 **DATED** this 5th day of November 2019.

11 **CLOUTIER ARNOLD JACOBOWITZ, PLLC**

12
13 /s/ Nathan J. Arnold
14 Nathan J. Arnold WSBA No. 45356
15 Emanuel Jacobowitz, WSBA No. 39991
16 Cloutier Arnold Jacobowitz, PLLC
17 2701 First Avenue, Suite 200
18 Seattle, WA 98121
19 (206) 866-3230; Fax (206) 866-3244
20 Nathan@CAJLawyers.com
21 *Counsel for Plaintiff*
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to those registered with CM/ECF, including the following:

Joseph T McCormick, III
jmccormick@wrightlegal.net

Michael DeLeo
mdeleo@prklaw.com

EXECUTED this 5th day of November 2019 at Seattle, Washington.

/s/Nathan J. Arnold
Nathan J. Arnold, WSBA #45356